United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavit of Mailing

74-1070

To be argued by
MYLES C. CUNNINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1070

UNITED STATES OF AMERICA,

Appellee,

—against—

MAX BEER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
MYLES C. CUNNINGHAM,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

This is an appeal from the denial of a post-conviction motion to dismiss the underlying indictment on the ground that the Government has violated the *Second Circuit's Rules Regarding Prompt Disposition of Criminal Cases.**

The pertinent sequence of events was as follows:

June 12, 1972	Appellant arrested.
June 13, 1972	Appellant arraigned before U.S. Magistrate and released on $10,000. surety bond.
June 29, 1972	Indictment filed.

* These Rules have been replaced by the Plan for Achieving Prompt Disposition of Criminal Cases. (App. Feb. 28, 1973; eff. April 1, 1973).

July 21, 1972	Appellant entered a plea of not guilty to the indictment.
August 28, 1972	Government filed Notice of Readiness for Trial.
May 10, 1973	Application for re-assignment of counsel.
May 17, 1973	Stuart R. Shaw appointed counsel for appellant.
July 25, 1973	Appellant withdrew plea of not guilty and entered a plea of guilty to count one.
October 12, 1973	Appellant sentenced to 4 years imprisonment plus 5 years special parole on count one.
November 9, 1973	Notice of motion filed for dismissal of indictment.
November 16, 1973	Motion to dismiss argued and denied.
December 21, 1973	Notice of appeal filed.

As noted above appellant pleaded guilty on July 25, 1973 to one count of the indictment charging conspiracy to import cocaine into the United States and was subsequently sentenced to four years imprisonment plus a special parole term of five years, which sentence he is presently serving.

Statement of Facts

Appellant, together with a co-defendant, was arrested on June 12, 1972 in the Eastern District of New York. On the following day, appellant appeared before a United States Magistrate and was immediately admitted to bail. Thereafter, on June 29, 1972, appellant was indicted for conspiracy to import cocaine, importation of cocaine and possession of cocaine with intent to distribute. Three weeks later, on July 21, 1972, appellant entered a plea of not

guilty to the indictment. Within three months of appellant's arrest, on August 28, 1972, the Government filed its notice of readiness for trial.

The case was originally assigned to the Honorable George Rosling but subsequently was re-assigned to the Honorable Mark A. Constantino on May 10, 1973. Prior to Judge Rosling's death, all discovery had been completed and the case was awaiting trial date. On May 10, 1973 an application was made for re-assignment of counsel and appellant's present counsel, Stuart R. Shaw, was appointed by the Court on May 17, 1972. On July 25, 1973, appellant withdrew his plea of not guilty to the indictment and pleaded guilty to Count One. Subsequently appellant was sentenced on October 12, 1973, to four years imprisonment plus a special parole term of five years.

At the time of sentencing appellant made an oral motion to dismiss the indictment on the ground that appellant had not been brought to trial within six months. (Transcript of October 12, 1974 Sentencing, pp. 6-12.) There followed the following colloquy (pp. 11-12):

> Mr. DePetris: I'm sorry. The motion is what?
>
> The Court: That he hasn't been given a trial during the six-month period.
>
> Mr. DePetris: Notice of readiness was filed. The Government was ready.
>
> The Court: It's not that easy. Let him put it on papers. Let him make motion on papers.
>
> Mr. Shaw: If Mr. DePetris thinks it's frivolous, Mr. DePetris can state so. I don't want to take up the Court's time——
>
> Mr. DePetris: In fact, your Honor, he was arraigned before the Magistrate on June 13, 1972. And in August the notice of readiness was filed. So it's two months.
>
> Mr. Shaw: Then it's a frivolous motion.

> The Court: It's a frivolous motion. I just wanted to make sure you understand that.
>
> Mr. Shaw: Fine, your Honor.
>
> The Court: All right. Now, are you ready for sentence?

Appellant thus conceded that a motion to dismiss on the basis of the six month rule was frivolous; however, on November 9, 1973 appellant noticed a motion to dismiss the indictment on the identical grounds. This motion was denied on November 16, 1973.

Appellant now appeals from the denial of this post-conviction motion.

ARGUMENT

Rule 8 of the *Second Circuit Rules for the Prompt Disposition of Criminal Cases* states, in applicable part, as follows:

> ". . . failure of a defendant to move for discharge prior to plea of guilty shall constitute waiver of such rights."

Appellant raised the question of the "six month rule" for the first time on the day of his sentencing (App. Br. p. iv), some three months after the entry of his guilty plea to one count of an indictment charging conspiracy to import cocaine. The unequivocable language of Rule 8 together with appellant's statement that he asserted his right for the first time at sentencing clearly mandates a finding of waiver of any right under this Circuit's "six month rule".* In any

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* Appellant made his formal motion apparently under Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases on November 16, 1972. The Plan for Achieving Prompt Disposition of Criminal Cases, adopted in the Eastern District of New York, became effective on April 1, 1973. Therefore, the motion should have been predicated on the Eastern District Plan. In any event, the waiver provisions of the two Plans are identical.

event, appellant made no attempt to preserve any issue for appeal before his plea of guilty and therefore cannot be heard to complain.

Assuming *arguendo* that appellant's conduct did not constitute a waiver of his rights under the "six month rules," the District Court properly denied the motion as the Government complied with both the letter and the spirit of the Rules. The Government filed the requisite "notice of readiness" within three months of appellant's arrest and was in fact "ready" for trial as illustrated by the completeness of the evidence presented to the grand jury.*

Appellant's argument that the Government must bring a defendant to trial within six months or face dismissal of the indictment is equally frivolous. Both the *Second Circuit Rules* and the decisions of this Court negate appellant's position. *Hilbert* v. *Dooling,* 476 F.2d 355, 357 (2d Cir. 1973), a case relied upon by appellant, emphatically states the Court's disagreement with appellant's position.

> "However the Rules do not mandate trial within a specified period of time, as has been urged by some."

It should also be noted that appellant's reliance on *Barker* v. *Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) is misplaced. *Barker* outwardly rejects any constitutional argument of speedy trial based on a fixed time period.

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* The grand jury heard direct testimony from the United States Customs Agent who arrested the defendant in possession of the cocaine, from the person who supplied the defendant with the cocaine and from the person who arranged for the transportation of the cocaine into the United States.

> "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Barker* v. *Wingo, supra,* at p. 523.

This appeal is totally without merit and should not now be before this Court.

CONCLUSION

Appellant's motion was properly denied.

Respectfully submitted,

April 10, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 10th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Stuart R. Shaw, Esq.
Suite 3307
233 Broadway

New York, New York 10007

Sworn to before me this
10th day of April 1974

[illegible]
[illegible] New York
[illegible]
[illegible] County
[illegible] Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly **entered** herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

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